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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Z.J., a Person Coming
Under the Juvenile Court Law.

B290485
(Los Angeles County
Super. Ct. No. DK19438A)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

DONALD J.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Kim L. Nguyen, Judge. Affirmed.

Emery El Habiby, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine Miles,
Assistant County Counsel, Stephen D. Watson, Deputy County
Counsel, for Plaintiff and Respondent.

Donald J. (father) appeals from the order of the juvenile court denying his petition for modification and terminating his parental rights to three-year-old Z.J. (Welf. & Inst. Code, §§ 388 & 366.26.)¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The dependency and the reunification period

The child was living with his maternal grandmother in Las Vegas, Nevada when she was arrested in July 2016. As the child's mother was deceased, the Clark County, Nevada court gave custody of him to father. Shortly thereafter, the two moved to Los Angeles County.

Less than a month later, the Department of Children and Family Services (the Department) received a referral alleging that father was abusing and neglecting the child and smoking marijuana in the presence of the child, who was dirty, smelled of urine, and was losing weight.

CT scans revealed that in the 26 days between the referral and the child's removal from father, the child sustained a fractured skull, a hematoma on his forehead, a broken right hand, and a burn mark on his back. Father resisted the social worker's suggestion that he stop smoking marijuana.

Father did not appear at the jurisdiction and disposition hearing in mid-November 2016. The juvenile court found true

¹ All further statutory references are to the Welfare and Institutions Code.

the petition's allegations of the injuries the child suffered and sustained the allegations that father physically abused the child and failed to protect him. (§ 300, subds. (a) & (b).) The court removed the child from father's custody and ordered father to participate in reunification services that included an anger management program and individual counseling to address case issues. The court awarded father monitored visitation twice a week for two hours.

After that hearing, father disappeared and failed to respond to the social worker's numerous efforts to contact him. Finally in early May 2017, father told the Department that he was living in Nevada. He explained that he did not contact the Department because he believed that his parental rights had already been terminated.

Father appeared at the six-month review hearing (§ 366.21) in May 2017. The court terminated reunification services after finding that father had not made progress in the last period toward alleviating the causes necessitating placement in foster care, had not contacted and visited the child consistently or regularly, or demonstrated the capacity to complete the objectives of his treatment plan, and that there was no substantial probability that the child could be returned to father's custody within the next period of review. The court scheduled the section 366.26 hearing.

In the summer of 2017, father contacted the social worker and provided certificates showing his completion of a parenting program. Father explained that he was about to begin counseling in Nevada. He also visited the child once in September 2017 and again in October, and he had scheduled two more visits in November. The Department, who monitored those visits,

reported that father acted appropriately and gave the child his undivided attention. The child called father “daddy,” and was “significantly connected” to his relatives, including father. The family had been appropriate during visits and engaged with the child in a positive manner. The child displayed a “good and *promising family* relationship” during visits. (Italics added.) Father indicated he wanted to reunify with the child.

In December 2017, the child moved to Missouri to live with maternal great aunt, R.M., as ordered by the juvenile court. The court awarded father visits via Skype. Since his move, the child has bonded with, and thrived in the care of R.M., who wanted to adopt him.

Father’s Skype visits after the child moved to Missouri were sporadic and he never asked to visit the child in person. Father’s Skype visits were scheduled to occur three times a week for an hour each. According to R.M., father had two Skype visits in May 2018 for 33 minutes in all. Mostly, the child cried and said very little, preferring to play with his toys. The Department reminded the court that before the child moved to Missouri, he had had all of three visits with father and no telephone contact. The Department concluded that the child had no significant contact with father since his detention. Nor had father reached out to the Department or to previous caregivers to inquire about the child’s wellbeing or to establish a bond with him.

II. Petition for modification (§ 388)

Father filed a section 388 petition for modification on May 16, 2018 asking the juvenile court to place the child with him or to allow him additional reunification services. As circumstances changed, father cited his previous completion of a parenting class and drug rehabilitation program, and reported

that he was attending weekly individual counseling.² He also asserted that he visited the child through Skype. The change in order would be in the child's best interest, father argued, because he and the child had a "strong bond and love for one another," and placement with father would enable the child to see both sides of his family. The juvenile court summarily denied the petition.

III. The selection and implementation hearing (§ 366.26)

On May 23, 2018, paternal grandmother testified that she had participated in three-way telephone calls with father and the child. She watched father talk to the child and try "to educate" and communicate with him, but the child's attention span is short. She described father's relationship with his son as being "as strong as it can possibly be, considering the circumstances." Father had custody of the child for 45 days.

Father testified that he began visiting the child in late 2017 after he became "stable" and after he came to court and learned that his parental rights had not been terminated. He visited twice, but then the child moved to Missouri. Father did not try to visit the child in person because he had no visitation monitor. He Skyped with the child three times a week. The two talked and father tried to teach the child his colors. The child called him "'daddy.'" Visits were short. Father testified that he tried contacting R.M. about the child, but she has never responded.

After finding that the child was adoptable and that father had not proven the existence of an exception to adoption, the juvenile court terminated parental rights. Father appealed.

² The documents submitted by father in support of his motion that are contained in the record are illegible.

DISCUSSION

I. No abuse of discretion in summarily denying father's petition for modification

Father contends that the juvenile court abused its discretion in summarily denying his section 388 petition because he made the required prima facie showing.

Section 388 enables a parent to move to modify a juvenile court order by presenting a prima facie showing of new evidence or a change of circumstances *and* that the proposed modification of the previous order is in the child's best interest. (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478.) The court considers the entire factual and procedural history of the case and liberally construes the petition's showing in favor of holding a hearing. However, "[t]he prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) We review the summary denial of a section 388 petition for abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.)

"Not every change in circumstance can justify modification of a prior order. [Citation.] The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citations.] In other words, the problem that initially brought the child within the dependency system must be removed or ameliorated. [Citations.] The change in circumstances . . . must be of *such significant nature* that it requires a setting aside or modification of the challenged order." (*In re A.A.* (2012) 203 Cal.App.4th 597, 612, italics added.)

We must also be mindful that after reunification services are terminated, which occurred in this case a year before father filed his section 388 petition, a parent's interest in the care, custody and companionship of the child is no longer paramount. At that point, the focus shifts “ ‘to the needs of the child for permanency and stability’ [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

Father did not meet his burden. He contends he made the required showing because he completed a parenting class and a drug rehabilitation program, and was attending individual counseling weekly. The first two of these changes occurred long before the court placed the child in Missouri. Otherwise, all that father demonstrated was that he was in the midst of therapy. We applaud father's efforts, but they are incomplete. The child was removed from father's custody because he sustained horrific injuries at father's hand.³ In response, the juvenile court ordered father, among other things, to participate in an anger management program and to address case issues in individual therapy. Father presented no evidence that he enrolled in any anger management class, and he has only had six months of counseling. Liberally construed, father's petition shows only that circumstances were changing, but not that the violence that caused the child's removal was removed or ameliorated. (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 612.)

³ Father's contention that he “did not have a history of physical abuse against [the child]” completely ignores the factual findings the juvenile court made in sustaining the petition.

Even if this evidence constituted a genuine change in circumstances, father failed to show how resuming reunification services or returning the child to his custody would be in the child's best interest. "The factors to be considered in evaluating the child's best interests under section 388 are (1) the seriousness of the problem that led to the dependency and the reason for any continuation of that problem; (2) the strength of the child's bond with his or her new caretakers compared with the strength of the child's bond with the parent; and (3) the degree to which the problem leading to the dependency may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 224.)

None of these factors weighs in father's favor. This kind of child abuse is extremely serious and father failed to demonstrate that he has removed or ameliorated the causes. Father only had custody of the child for 45 days whereas the child is bonded and thriving with R.M., where he has been for over half of his life. Father focuses on the Department's report in mid-November 2017 that the child was connected with his relatives and had a good, *promising* family relationship. But that comment occurred six months before father filed his modification petition, after which father had very limited contact with the child. Moreover, that comment referred to the child's connection with *all* family members, not just father. Delaying the selection of a permanent home for the child this far into the dependency simply to see whether father, who failed to reunify, might be able to reunify at some future date, does not promote stability or the child's best interests. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47; accord, *In re Mary G.* (2007) 151 Cal.App.4th 184, 206.)

II. No error in declining to apply parental relationship exception to adoption

“The selection and implementation hearing under section 366.26 takes place after the juvenile court finds that the parents are unfit and the child cannot be returned to them.’” (*In re Grace P.* (2017) 8 Cal.App.5th 605, 611.) At that hearing, the court must order one of three dispositional alternatives: adoption, guardianship, or long-term foster care.

Adoption is strongly preferred by the Legislature. (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395.) Section 366.26, subdivisions (c)(1) and (c)(1)(B) direct, if the court finds that the child is adoptable—a finding father did not challenge—“the court shall terminate parental rights” unless it “finds a compelling reason for determining that termination would be detrimental to the child due to” one of the six statutory exceptions. Accordingly, if the child is adoptable, only “‘in exceptional circumstances,’” may the court “‘choose an option other than the norm, which remains adoption.’” (*Anthony B.*, at p. 395, italics omitted.)

Father had the burden to prove the existence of a statutory exception to termination. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 574 (*Autumn H.*.) We review the juvenile court’s assessment whether a beneficial relationship exists for substantial evidence. (*Bailey J.*, at p. 1314.) We similarly review for abuse of discretion the court’s determination whether the cited relationship constitutes a “‘compelling reason for determining that termination [of parental rights] would be detrimental.’” (*Ibid.*)

Father relied on the parental relationship exception (§ 366.26, subd. (c)(1)(B)(i)), which permits the juvenile court to avoid adoption if “[t]he parents have maintained regular

visitation and contact with the child *and* the child would benefit from continuing the relationship.” (*Ibid.*, italics added.)

Father had absolutely no contact with the child for the year after the child was removed from his custody. Father justified this silence by claiming he thought his parental rights had been terminated at the disposition hearing. Yet, although he admitted he was disabused of that notion in May 2017, he still did not visit the child for six more months. Upon resumption of visitation in September 2017, father saw the child four times until December 2017 when the child moved to Missouri. Thereafter through May 23, 2018, father’s Skype visits were sporadic. Father testified he called the child three times a week for short periods. But the juvenile court also had the Department’s and R.M.’s reports that in May 2018, father spoke to the child only twice for a total of under 34 minutes. Even crediting father’s testimony, he had extremely limited contact with the child during the 18 months of this dependency.

Nor did father meet the second prong of his burden, namely to show that “the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The phrase “‘benefit from continuing the . . . relationship’ is understood by courts to refer to a parent child relationship that “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly

harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord, *In re Breanna S.* (2017) 8 Cal.App.5th 636, 646.)

Father again points to the Department's report that in November 2017, the child had a "good and *promising family* relationship" and was comfortable around father, whom he referred to as "daddy." (Italics added.) Father adds that he gave the child his undivided attention during visits and that in November 2017, the child had a good connection with him. But, to avoid adoption, the parent-child contact must be more than pleasant. (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318.) Even frequent and loving contact and the existence of an emotional bond with a child is not enough to depart from the statutory preference for adoption. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) The parental relationship exception is not applied merely because "the child derives some benefit from the relationship." (*In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 646.) The role must be parental. (*In re C.F.* (2011) 193 Cal.App.4th 549, 555.) But there is no evidence that father saw to the child's needs during the dependency, and their visits were always monitored. Substantial, positive attachment arises from daily interaction and attention to the child's needs, companionship, and shared experiences. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The court clearly believed the Department's reports about R.M.'s observations that during visits the child cried and appeared to prefer playing with his toys. Meanwhile, the child has bonded and thrived with R.M., with whom he lived for half of his life. The juvenile court did not abuse its discretion in concluding that there was no compelling reason to find that these

facts present the exceptional circumstance that would justify an option other than adoption.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.